



# Reforms in the Legal Process—Part 1

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# Public Chapter 289

How the Reform Act Will Affect  
Medical and Indemnity Benefits

# Public Chapter 289

- New Definition of Injury
  - “Primarily” Caused by Work
  - Medical Proof
- Selection of Medical Provider
- Impairment Ratings
- PPD Formula
- Utilization Review

# Public Chapter 289

- Public Chapter 289 was signed by Governor Haslam on April 29, 2013
- The benefit-related provisions of PC 289 are applicable to dates of injury on or after July 1, 2014
- DOI before July 1, 2014 will be subject to the current law

# Definition of Injury

- Amendments from 2011 brought “primarily” into the definition of injury for the first time
- This only applied to cumulative or gradual injuries for DOI on or after June 6, 2011
  - Left out acute injuries
- What about aggravations or advancements of pre-existing condition?

# Definition of Injury

- PC 289 expands the “primarily” standard to all injuries
- Modification of case law standard of “could be” causally related when supported by lay testimony
  - *Reeser v. Yellow Freight Sys.*, 938 S.W.2d 690 (Tenn. 1997)
- Should eliminate arguments regarding acute vs. gradual, aggravation vs. new injury, etc.

# Definition of Injury

- What does “primarily” mean?
- The answer:
  - “the employment contributed more than fifty percent (50%) in causing the injury, considering all causes.” T.C.A. 50-6-102(12)(B) (as amended)
- So how do you prove it?



# Definition of Injury

- Except in most obvious cases, expert medical proof is required
  - *Bolton v. CNA Ins. Co.*, 821 S.W.2d 932 (Tenn. 1991)
- Medical expert must state that work primarily caused the injury to a reasonable degree of medical certainty
- What does that mean?



# Definition of Injury

- Reasonable degree of medical certainty means, “in the opinion of the physician, it is more likely than not considering all causes, as opposed to speculation or possibility.” T.C.A. 50-6-102(12)(D) (as amended)
  - Essentially, greater than 50% probability

# Definition of Injury

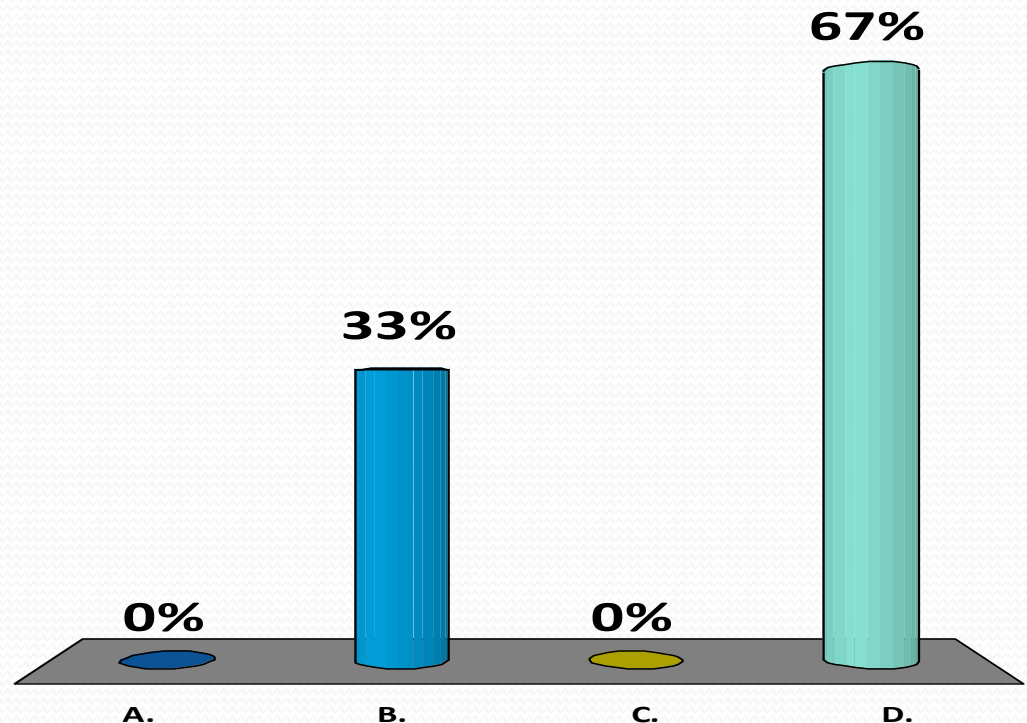
- Remember there are two >50% standards in the new law
  - Work caused contributed more than 50% of the resulting injury or disability (i.e., “primarily”)
  - Physician is more than 50% certain that work was primary cause of the injury or disability (i.e., reasonable degree of medical certainty)

# Definition of Injury

- More definable standard than “could be” the cause of the injury when supported by lay testimony
- Panel physician’s opinion still has presumption of correctness
  - Can be overcome by a preponderance of the evidence
  - Less need for IME’s

# PC 1100 (2012) allows for a panel of pain management specialists within what radius from the injured worker's residence?

- A. 75 miles
- B. 100 miles
- C. 150 miles
- D. 175 miles



# Selection of Medical Provider

- Selection from Panel
- Current process has three options for the initial panel
  - Panel of three
  - Panel of three plus chiro
  - Panel of five with orthos and neuros
- Often difficult to determine which to use

# Selection of Medical Provider

- After EE has made a choice and seen a doctor, what happens if the chosen doctor makes a non-pain management referral?
  - Referral to a specific individual or just general referral?
  - Give another panel?
  - Can EE insist on another panel if displeased with referral?

# Selection of Medical Provider

- PC 289 simplifies the process by having just one panel of three or more independent physicians, specialists, chiropractors, or practice groups (or any combination thereof)
  - More flexibility to put the right people on the panel
  - Realization of changing patterns of group practices



# Selection of Medical Provider

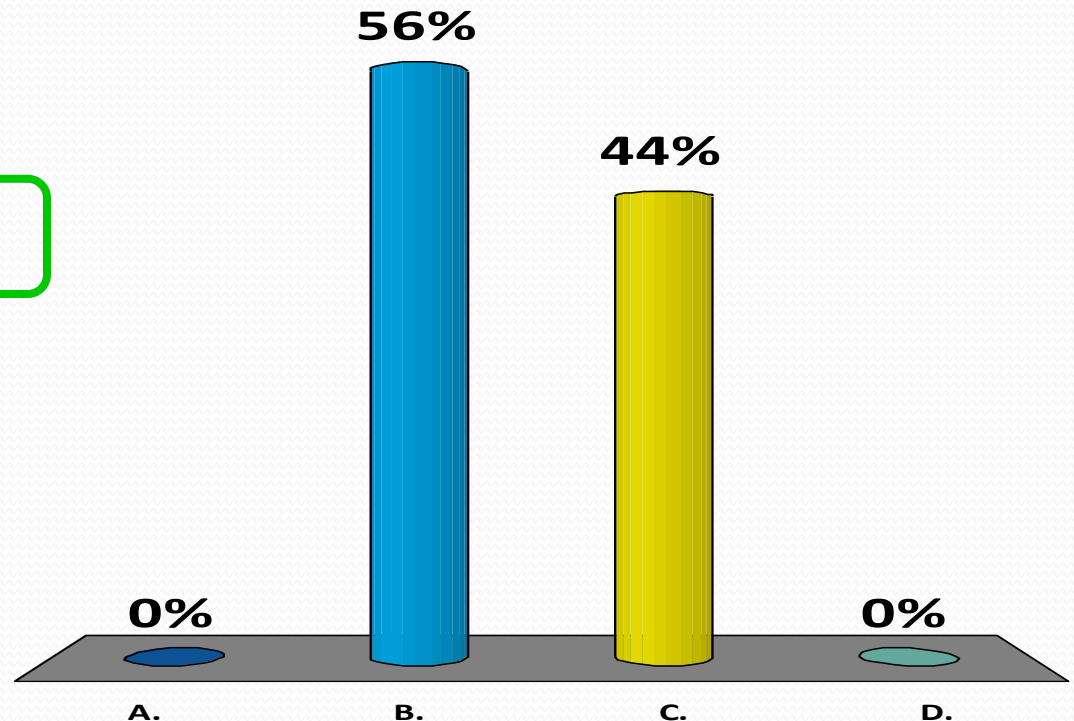
- Providers placed on the panel must be willing to treat the injured worker
  - If not, ER must provide an additional choice
- Maintains the “community” rule, but allows a 100-mile radius if not available in the community
  - EE still gets travel reimbursement if outside 15-mile radius
- Division can enforce a penalty for improper panels

# Selection of Medical Provider

- After EE chooses a physician, if a referral is made, then ER can either:
  - accept the referral and set up appointment, or
  - within three business days from notice of the referral, offer a new panel
- If ER does not act within those three days, then the referral has been deemed accepted
- PC 1100 stills applies for pain management referrals

# What is the first date of injury for the application of the 6<sup>th</sup> Edition of the AMA Guides?

- A. July 1, 2007
- B. January 1, 2008**
- C. July 1, 2008
- D. January 1, 2009



# Impairment Ratings

- Impairment Ratings pursuant to 6<sup>th</sup> Edition of AMA Guides for injuries on or after January 1, 2008
- Current law gives no presumption to treating physician's rating
- Presumption is only given on impairment ratings when the parties have accessed the MIRR program and a MIRR physician produces a rating

# Impairment Ratings

- PC 289 gives presumption to treating physician's rating
- Presumption can be overcome by a preponderance of the evidence
- MIRR is still available when there is a dispute over the ratings
  - MIRR presumption can only be overcome by clear and convincing evidence and trumps treating physician's presumption

# Impairment Ratings

- Under current law, ratings can be assigned to specific body parts
- This can lead to confusion when more than one body part is injured
  - Multiple ratings to scheduled body parts, non-scheduled body parts, or any combination thereof
- Under PC 289, all ratings will be converted to the body as a whole

# Permanent Partial Disability

- The current PPD system has a cap of 1.5 times the impairment rating for RTW case and a cap of 6 times the impairment rating for non-RTW cases
- There is a list of 31 scheduled injuries that range from 10 weeks to 400 weeks
- For non-scheduled (BAW) injuries, the max number of weeks is 400



# Permanent Partial Disability

- Under PC 289, all ratings will be converted to the body as a whole, which has been increased to 450 weeks
- Comp rate will still be  $\frac{2}{3}$  of average weekly wages, up to max of 100% of state's average weekly wage
- For RTW cases, the formula is:
  - Impairment rating X 450 weeks X comp rate

# Permanent Partial Disability

- The RTW formula makes up the “period of compensation”
- To be entitled to the non-RTW award, the injured worker must not have returned to work at the same or greater pre-injury wage for any employer by the time the compensation period ends
- Same considerations apply as with current law that there must be a reasonable return to work or reasonable offer

# Permanent Partial Disability

- Example:
  - Comp rate is \$500 (\$750 AWW)
  - Impairment rating is 7%
  - $.07 \times 450 \times \$500 = \$15,750$
  - $.07 \times 450 = 31.5$  weeks (period of compensation)
  - Look at 31.5 weeks after MMI to see whether non-RTW is applicable

# Permanent Partial Disability

- For non-RTW cases, there are additional factors that increase the award
  - Automatic 1.35x for non-RTW
  - 1.2x if injured worker is 40 years old or over when period of compensation ends
  - 1.45x if injured worker lacks high school diploma or GED
  - 1.3x if county of employment has an unemployment rate 2% points higher than statewide average

# Permanent Partial Disability

- Example

- Injured worker is 45, 8<sup>th</sup> grade education, worked in Davidson County
- Comp rate is \$500
- Impairment rating is 7%
- $0.07 \times 450 \times \$500 \times 1.35 \times 1.2 \times 1.45 = \$36,996.75$

# Permanent Partial Disability

- Nothing in the new statutes precludes parties from settling entire PPD at any time after MMI
  - If parties agree that injured worker will not return to pre-injury wage by end of period of compensation, then can settle at that time rather than waiting
- Eliminates need for reconsideration

# Utilization Review

- Utilization Review is mostly dealt with in rules
- PC 289 does give a presumption that treating physician's recommended treatment is medically necessary
  - Can be overcome by a preponderance of the evidence
  - UR denials must be sufficient to overcome that presumption



# Utilization Review

- PC 289 also requires the Division to promulgate treatment guidelines by January 1, 2016
- If recommended treatment follows the guidelines, then it is presumed medically necessary unless there is clear and convincing evidence to the contrary

# Utilization Review

- Division also plans to revise the UR rules in order to streamline the appeal process
- There will be a fee for appeals completed by the Division